BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: FRED T., Claimant, and SAN DIEGO REGIONAL CENTER, Service Agency.	OAH No. L 2006030012

DECISION

Gary Brozio, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on June 19 through 21 and July 10 through 11, 2006.

Ronald R. House, Attorney at Law, represented the San Diego Regional Center (SDRC).

Maureen R. Graves, Attorney at Law, represented Fred T. (Claimant). Claimant authorized the legal representation, and his authorized representative, Pastor Stephen Donovan, was present throughout the proceedings. Claimant was present on June 19, 2006.

Submission of the matter was deferred pending the filing of simultaneous post-hearing briefs. The final brief was received on August 7, 2006.

ISSUE

Does Claimant have a developmental disability, originating before he reached age 18 that qualifies him for regional center services under the Lanterman Act?

FACTUAL FINDINGS

I. The Factual and Legal Dispute

1. Claimant initially sought regional center services in early 2003 when he was 41 years old. SDRC denied his application. In late 2005, Claimant reapplied for services at age 44.

In December 2005, SDRC completed Claimant's social summary. In January 2006, the SDRC's Developmental Disabilities Screening Team (composed of a physician, psychologist, educational consultant, and an intake social work counselor) denied Claimant's request for regional center services. The team found that Claimant was not substantially disabled by a developmental disability and that there were no records indicating that Claimant's condition originated before age18. Claimant filed a Fair Hearing Request.

Thereafter, the parties had an informal meeting, but it failed to resolve the dispute. SDRC's Executive Director, Raymond Peterson, M.D., wrote a follow-up letter detailing SDRC's reasons for rejecting Claimant's application for services. Pastor Donovan, Claimant's authorized representative, requested a state-level hearing.

2. Claimant contends that he is eligible for regional center services because he is mentally retarded, because he has a condition similar to mental retardation, or because he has a condition that requires treatment similar to that required for a mentally retarded individual. (Welf. & Inst. Code, § 4512, subd. (a).) The latter category is commonly referred to as the "fifth category." Claimant had the burden to prove his eligibility under one of these categories, that his disability was substantial, and that it originated before age 18.

II. Psychological and Legal Standards

3. *Mental Retardation*: Two standards for a diagnosis of mental retardation were presented at the hearing – those set down by The American Association on Mental Retardation (AAMR) and those set down by The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). The AAMR and the DSM-IV-TR take slightly different approaches. The DSM-IV-TR focuses on deficits (what the person cannot do) and the AAMR focuses on what the person is capable of doing in conjunction with the sort of supports her or she needs. Both require the person to have an I.Q. of 70 or below with significant functional limitations in adaptive skills, in the ability to interact with the world, and in independent living. The AAMR states that "[m]ental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age18." The DSM-IV-TR states that the essential feature of mental retardation is "significantly subaverage general intellectual functioning" in combination with "significant limitations in adaptive functioning" in at least two skill areas. (DSM-IV-TR at 41.) Significantly subaverage intellectual functioning occurs in individuals with I.Q. test scores of 70 or below. Adaptive functioning refers to

how well individuals meet "the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." (DSM-IV-TR at 42.)

4. *The Fifth Category*: The standard for a diagnosis under the fifth category has not been addressed by the AAMR or the DSM-IV-TR. Under the fifth category, the Lanterman Act provides assistance to individuals with a condition "closely related to mental retardation" or who require "treatment similar to that required for individuals with mental retardation." In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the California Court of Appeal held that the fifth category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Id.*, at 1129.)

In 2002, the Association of Regional Center Agencies (ARCA) refined the standards for purposes of making eligibility determinations under the fifth category. The standards are complex, but in general ask whether an individual "functions" similarly to a mentally retarded person or requires similar "treatment." Generally, individuals who function similarly to mentally retarded people have low borderline range of intelligence and I.Q. scores ranging from 70 to 74 with significant deficits in adaptive skills. Treatment questions concern the nature of the required "training and intervention." The evaluators should consider whether the individual demonstrates performance based deficits, has skill deficits secondary to intellectual limitations (but not socio-cultural depravation), requires habilitation (but not rehabilitation), or requires long term training broken down into discrete units taught by repetition. For children, the evaluators should consider the intensity and types of educational supports needed to assist learning.

5. *Substantial Disability*: The Lanterman Act requires specific proof of limitations in adaptive functioning. Welfare and Institutions Code section 4512, subdivision (l), requires an applicant to show a "substantial disability," which requires proof of at least three "significant functional limitations" in the areas of self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self sufficiency. California Code of Regulations, title 17, section 54001, and the ARCA requirements repeat these requirements under the fifth category.

6. *Origination*: Under the Lanterman Act, a developmental disability qualifies a person for eligibility only if it originates "before an individual attains age 18 years." (§ 4512, subd. (a).) The California Code of Regulations repeats this prerequisite (§ 54001) as do the ARCA requirements. The ARCA standards say that the evaluators should identify skill deficits due to cognitive limitations and not consider "performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural depravation, poor motivation, substance abuse, or limited experience."

III. Background

7. *Childhood (1961 - 1967)*: Claimant was born May 30, 1961. He was the sixth and youngest child in his family. He had four older brothers and an older sister. There were nine years between Claimant and his next oldest sibling. His mother was 41 when he was born; his father was 45.

The family owned and operated a diary farm in Ontario, California. The family was deeply rooted in the Dutch culture and the protestant religion.

8. There were no medical or psychological records from Claimant's childhood offered in evidence. Claimant's sister, Joanne Verhoeven, provided the only testimony concerning this period. She babysat Claimant from the time he was born until he was seven years old. She stopped babysitting Claimant when she turned 18. She described Claimant as a happy-go-lucky child. She could not recall any bizarre behavior in the first seven years. She recalled that, at around age five, their parents built Claimant a pulpit and he would practice preaching. He could repeat the phrases and inflection of the pastor he saw in church. Claimant would also follow behind the gardener when the gardener was working in the yard. At around the same time, Claimant fell out of a haystack on his head and was rushed to the hospital. Verhoeven noticed no difference in Claimant's behavior after the fall.

9. *Elementary School (1967- 1973)*: There were no medical records, psychological records, or school records from Claimant's elementary school years offered in evidence. The only evidence of testing was a notation in the report of Barbara Schrock, Ph.D., stating that Claimant's mother had his reading tested at an early age, and there was no evidence of a reading disability. There was no evidence concerning when this testing occurred or what it entailed.

The only testimony about Claimant's elementary school years came from his sister. Verhoeven first noticed delays in Claimant's cognitive development when he was in the fourth grade (approximately 10 years old). At that time, Claimant came to Verhoeven's home for a couple of months, and she noticed he was a slow learner. Verhoeven believed that their mother often helped Claimant with school work and sometimes did the work for him.

10. *Junior High School (1973 - 1975)*: There were no records from junior high school, and only sparse testimony from Claimant's school friend, Pastor Dale Visser. Pastor Visser testified that, in junior high school, Claimant weighed over 200 pounds and was often seen eating at the snack bar. Claimant used money to pay for food. He played flag football. Students snapped towels at him in the locker room. One time, a student put tacks on Claimant's seat, which Claimant did not feel when he sat down. When told, Claimant laughed about the incident.

11. *High School (1975 - 1979)*: Claimant attended Ontario Christian High School in Ontario, Califronia. The only record from this period was Claimant's final school

transcript. It showed that Claimant graduated in June 1979. He was 75th in a class of 78. He had a grade point average of 1.855. Claimant's grades were mostly D's and F's in academic subjects, but he got above average or superior grades in physical education, choir, and art. In October 1977, when Claimant was in the eleventh grade, he took a national test for achievement and proficiency. He did not meet the minimum competency in reading or math. He scored in the low range on most tests. The scores ranged from 2 to 10. However, he obtained relatively high scores in social studies (42) and science (62), which put his battery composite at 12. This score was somewhere in the below average range.

12. Claimant's principal, George Groen, wrote a letter concerning Claimant's schooling.[1] He confirmed that some of Claimant's high school grades were based on Claimant's effort and good attitude rather than his mastery of the subject matter. In the letter, Mr. Groen wrote that Claimant consistently needed direction, was not financially self-sufficient, lacked judgment, tried to please others, and was easily manipulated because he craved approval. The principal's letter explained that Claimant's parents made a considered choice to reject the pubic school system and special education in favor of a private, Christian school. The parents wanted Claimant to develop social skills and wanted him to be with his friends. They chose to keep him in a normal academic environment and attempted to compensate for his deficiencies through private tutoring.[2]

13. Mary Werkhoven tutored Claimant two times a week during high school. She was Claimant's only tutor, although she understood that other teachers would help Claimant after class. Werkhoven taught social studies and English. She tried to keep Claimant abreast in these subjects and sometimes used textbooks from lower grades to communicate the main topics. She helped Claimant take tests and write papers by reading the questions to him and recording his answers. She believed that Claimant struggled in all subjects and that he performed below his peers. Werkhoven said that Claimant was aware of his limitations but was not depressed about them. He tried his best and was usually happy. On certain days, however, Werkhoven saw that the behavior of students hurt Claimant. For example, he knew the students called him "retard," and he would ask Werkhoven, "I'm not, am I?"

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[1] The letter purported to be an affidavit. Although it contained a verified signature, it was not signed under penalty of perjury. Mr. Groen was not called as a witness and was not subject to cross examination. The affidavit was treated as hearsay.

[2] Other witnesses attributed the lack of testing and special education to lack of parental insight and cultural and religious influences. Claimant's sister said that their mother was in denial and had a hard time admitting Claimant might have a problem. The sister also testified that the Dutch were very prideful people, meaning that it was difficult for them to admit that a child had special needs. Pastor Visser testified that Claimant's parents misperceived his problem. They did not suspect that Claimant might need special education. They believed the school would provide the needed support in an appropriate religious context. The parents believed that Claimant only had to work harder. They saw it as a moral problem rather than a mental disability, and their culture and religion supported this view. These witnesses were young at the time and probably were not privy to the parents' decision-making process. The principal's letter demonstrated that the parents "went back and forth" regarding this decision. They contacted public schools, and they discussed the issue with the principal of the private school. Thus, the parents confronted the problem directly and made a choice based on personal values.

14. Students picked on Claimant and laughed at him. He weighed 200 to 250 pounds and was not much concerned about self care. Students stole his locker combination, and he did not realize that they did so by watching him open the locker. Students would redo the wiring on his car so that it would not start. One time, students took his clothes while he was in the shower, and while naked, Claimant nearly ran outside after them. Another time, students ran Claimant's underwear up a flagpole. Still another time, students laughed at Claimant because he cut his face shaving with a standard razor (rather than his usual electric razor). Once, some students encouraged Claimant to preach to them for three or four days on the school grounds, and Claimant believed they actually wanted to hear him. When the students had enough of the farce, they threw things at Claimant until a teacher intervened. Claimant did not really understand why things went wrong.

Claimant was on the high school football team. He went to away games on the team bus. Pastor Visser testified that the coach put Claimant into the game only when it was decided because Claimant did not contribute to the plays or understand them. Claimant also golfed. He could hit the ball close to 300 yards but could not keep score.

15. Pastor Visser described Claimant as gullible. He was unaware of the nature of the slights committed against him. One time his friends put down a false golf ball, which went up in a puff of smoke when Claimant hit it. Claimant believed he hit the ball so hard he "smoked" it. Claimant was unaware when others purposely allowed him to achieve things he could not actually achieve on his own. For example, the high school football coach put Claimant in as a tailback in practice and told the players to allow him to score a touchdown. Claimant ran into the end zone and believed he had scored even though the players feigned tackling him. Although Claimant often failed to understand that others were making fun of him, he often felt hurt and angry from teasing and pranks.

16. Claimant got his driver's license at age 16. Afterward, he drove 15 to 20 miles to school. He drove to his tutor's house. He once drove 60 miles to and from a prom in Costa Mesa after his parents showed him how to get there. Claimant's driving was not so good. He cut people off and could not judge distances, and he apparently wrecked more than one car. One time he knowingly sped past a police officer because he was late for a football game, and he got a ticket.

17. Claimant worked on the family dairy farm. Verhoeven testified that Claimant could not work like his brothers. He was not good at birthing claves, and he had trouble filling tires with 80 pounds of air. But he clipped hay bails, fed the animals, drove a tractor, and pushed manure and hay bails.

18. *Late Teens and Twenties (1979 - 1991)*: After high school, Claimant worked at two gas stations. Claimant could do simple monetary transactions. He could use a cash register. The owner of the second gas station (across the street from the first) hired Claimant away because his likeable personality attracted business.

Claimant lived at home after high school.[3] At this time, Claimant began visiting prostitutes, and his parents moved him into a room next to their house because they could not tolerate Claimant's activities. Neither could they require him to leave.

19. After Claimant had been out of high school three to five years, Mary Werkhoven saw him at Knotts Berry Farm. Werkhoven learned that a hypnotist was using Claimant as the "dunce" in the show.

20. There is only one medical record form this period. It is from a psychiatric hospitalization. On December 30, 1986, Claimant was admitted at Beverly Manor in Riverside, California. He was discharged three months later on April 1, 1987. He was 25 years old. The discharge indicated the following diagnoses: Axis I – Histrionic personality; Axis II – Inadequate personality; Axis III – Dysthemic Disorder. There were no other records from this three-month hospitalization.

The diagnosis was probably made using the DSM-III. From 1980 to 1987, the psychological profession used the DSM-III. Sometime in 1987, the DSM-III-R appeared. Both of these texts recognized the diagnosis of mental retardation under Axis II. The DSM-II defined "inadequate personality" as a behavior pattern "characterized by ineffectual responses to emotional, social, intellectual and physical demands." Patients manifested "inadaptability, ineptness, poor judgment, social instability, and lack of physical and emotional stamina" despite an apparent lack of physical or mental deficiency. This diagnosis appeared in the index of the DSM-III, where the user was referred to atypical, mixed, or another personality disorder. A printout from a website describing the disorder described it as a "chronic inability to meet ordinary life demands in the absence of mental retardation."

21. Claimant had a second psychiatric hospitalization at Charter Grove Psychiatric Hospital. There were no records from this treatment. At around this time, Claimant's pastor believed he was possessed, and Claimant's parents reluctantly agreed to an exorcism. No details were given about this event.

22. In 1989, one of Claimant's brothers saw him dancing in a nightclub in a g-string. Claimant thought he was entertaining, but the family believed he was being used.

23. *Thirties and Forties (1991 - present)*: In 1991 and 1992, Claimant worked at a gas station and lived in a motel.

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[3] The testimony concerning how long Claimant lived at home after high school was in conflict. For example, the report generated as the result of Sharp's testing indicated that claimant "lived at home approximately until the age of 20." This would have been a period of two years. This report was based on facts given by Pastor Donovan and Claimant. Other witnesses said Claimant lived at home five or six years after high school. At the end of the hearing, Pastor Donovan submitted a timeline showing that Claimant lived at home exclusively from 1979 to 1990, a period of 11 years. This report was based on hearsay from witness that did not sign declarations, did not testify at the hearing, and were not subject to cross examination.

24. On February 24, 1992, Claimant was admitted to the Scottsdale Camelback Hospital, in Scottsdale, Arizona. He was 31 years old. Two reports from Robert Maclachlan, M.D., were the only evidence regarding this hospitalization. Dr. MacLaughlin's intake report indicated that Claimant had an eating disorder and was morbidly obese (513 pounds). He admitted eating out of boredom and was experiencing endogenous depression. He was seeking psychiatric care to address the problem. At intake, Claimant told the doctor that he had two prior psychiatric hospitalizations and, at some point, he was prescribed Haldol, which affected him adversely. He related that he had past instances of suicidal ideation. The doctor initially diagnosed Claimant with dysthymic disorder and an overeating disorder. The doctor deferred diagnosis on Axis II, but in the body of the report wrote that Claimant's "[i]ntellectual ability appears to be in the low average to average range." About five weeks later, Dr. Maclachlan's discharge report indicated that Claimant "presented with suspicions of low average to borderline intelligence." The final diagnosis on Axis I was bulimia nervosa and dysthymic disorder; on Axis II the diagnosis was low average to borderline intellectual functioning with dependant and passive aggressive personality traits. The doctor prescribed 40 milligrams a day of Prozac. The plan was to refer Claimant to an adult residential treatment facility in California. In 1993, Claimant was admitted to Creekside in Escondido, California.

25. The details of the next seven years were vague and mostly based on hearsay. For a while, Claimant lived with a seminary student in an apartment. For some period, he lived in his car, with friends, or in Mexico. Part of the time he lived in a trailer on property owned by Hollandia Dairy in Escondido. His sister visited him at the trailer and testified that he lived in a dirty environment. At some point, he also had a job at a recycling facility where he greeted people, weighed materials, and made payments.

26. In 1999, Claimant began living at Oak Hill Residential Care Facility in Escondido, California. He became the activity director at this facility. He would push people in wheelchairs, play bingo, play videos, and perform other functions. At around the same time, he began receiving treatment for obesity from Elaine Davidson, M.D., of the Graybill Medical Group. He entered the program at 474 pounds, and from 1999 to early 2002, he lost more than 200 pounds. His mood seemed to improve despite continuing problems with varicose veins. He rode a bike from the facility to church, where he attended sermons, sang in a choir, and participated in the single-adults group. This was when Claimant met Pastor Donovan.

27. After living at Oak Hill for a while, Claimant decided he wanted a job. Claimant began working the graveyard shift at a local gas station. This was in addition to his responsibilities as the Oak Hill activity director. The gas station had two islands and a small kiosk. Claimant worked in the kiosk and took payment for gas and kiosk items. The owner gave Claimant a car and allowed him to pay for it in the course of his employment. Pastor Donovan believed that the owner was manipulating Claimant by making him work long hours on a set salary with no overtime pay. Pastor Donovan believed this because he could not locate any pay stubs.

28. One day, Claimant disappeared from Oak Hill and the gas station. He took his car to the Mexican boarder and was gone for eight weeks. Pastor Donovan found that Claimant's car had been left at the boarder and that Claimant was in jail for transporting drugs over the boarder. There were no police reports, court documents, or jail records regarding the conviction.

29. After being released from jail, Claimant spent some time at Oak Hill and some time homeless in Escondido. While homeless, Claimant slept in a vacant lot on the ground. He spent the day in the park and got breakfast and a snack lunch from a homeless facility.

30. In early February 2005, Claimant was again living at Oak Hill, and he planned to go alone on a weekend trip to Las Vegas. The staff purchased a bus ticket for him from Oceanside to Las Vegas, but Claimant exchanged the ticket for one to Tijuana, Mexico. He did not return on the planned date, and, eventually, the family hired a private investigator to find him. The investigator's reports contained considerable evidence that Claimant used drugs and frequented prostitutes in Mexico.

31. Verhoven testified that, between February and April 2005, Claimant was working for smugglers in Tijuana. According to Verhoven, the smugglers got Claimant a false California driver's license and a hotel room. During this time, Claimant made several smuggling trips over the boarder. One day, the boarder patrol caught him smuggling illegal aliens but did not arrest him. Claimant got frightened, stopped smuggling, and tried to return to Oak Hill. Thereafter, he entered a rehabilitation facility at his family's urging.

32. On April 5, 2005, Claimant was admitted to Calvery Rehabilitation Center for amphetamine chemical dependency. He was nearly 43 years old. The initial report of Ethan Kennedy, D.O., indicated that Claimant had "been using crystal methamphetamine, smoking it, and more so smoking crack one to two times a week, up to $40 to $60 an episode." Later, Martin Reiss, D.O, reexamined Claimant. Dr. Reiss' handwritten notes indicate that Claimant had been using crack cocaine and crystal methamphetamine for ten years. (In another place, the notes indicate drug use of three years.) Claimant said that he went to Mexico to get drugs. During the examination, the doctor found that Claimant's responses were age and gender appropriate. Claimant had logical thought processes. He was coherent, and he had no loose associations or flight of ideas. He had no significant depression. On Axis I, the doctor diagnosed Claimant with substance abuse and dependence. On Axis II, the doctor found that Claimant had ineffectual personality with mixed development features, family issues, and "possible borderline intelligence."

33. Sometime after Claimant got out of rehabilitation, the family helped him find an apartment in Escondido. They also helped him get at job at the San Diego Wild Animal Park. Claimant worked at a concession stand but was let go after two weeks because he was not fast enough. Thereafter, Pastor Donovan took a greater hand in caring for Claimant.

34. The pastor also suggested that Claimant be tested for sexually transmitted diseases. Claimant was found to have syphilis. Claimant's MRI was normal, but he had not had the SPECT scan necessary to rule out dementia secondary to syphilis.

35. On June 24 and July 5, 2005, Radmila West, Ph.D., tested Claimant at Sharp Rehabilitation Services. The details of the testing and Dr. West's testimony are discussed more fully below.

36. In late February and early March, 2006, the California Department of Rehabilitation created a plan for Claimant's employment. The disability determination indicated that Claimant had the most significant disabilities in self-care, work skills and tolerance, and interpersonal skills. He did not have significant disabilities in mobility or communication.

37. June 7 and 8, 2006, Mitchel Perlman, Ph.D., assessed Claimant and administered a battery of tests. The details of the testing and Dr. Perlman's testimony are discussed more fully below.

38. *Claimant's Current Status*: Claimant currently lives alone in an apartment in Escondido and likes it. He shops for groceries. He prepares simple foods. He cleans the house and keeps his apartment very clean. He goes to dentist appointments by himself if the date is on his calendar. He can call the pharmacy for prescriptions. He can learn repetitive tasks. Claimant reads the newspaper and two daily devotionals. He watches television, including the news and wrestling, but Pastor Donovan believes that his understanding is limited. Claimant also attends church and sings in the choir. He gets to church on a bus.

Claimant's family pays for his rent, food, and clothing. Pastor Donovan primarily assists him with healthcare and managing his finances. The pastor allocates Claimant's money by purchasing a Vons card for food and by giving Claimant some pocket money for movies and meals with friends. Otherwise, Claimant would spend the money all at once or give it away. Pastor Donovan also helps Claimant with more complex healthcare needs, such as procuring eyeglasses and attending doctor appointments. He helps Claimant overcome the fear of hypodermic needles and unfamiliar medical procedures. He helps Claimant relate information to doctors that Claimant might otherwise forget. Pastor Donovan also assists Claimant with more-complex household tasks such as procuring telephones, changing vacuum bags, and assembling appliances.

IV. Testing

39. *Dr. West's Testing*: When Dr. West tested Claimant in 2005, he was 44. Describing Claimant's demeanor and behavior, Dr. West stated that Claimant's mood was "reportedly euthymic" and his "affect was full in range and congruent with content." However, Claimant showed sensitivity to criticism, once cried when he misunderstood the examiner's comments, and required repeated reassurance. Claimant made "adequate effort" and reacted to failure appropriately, but he was "distracted with internal stimuli." Dr. West

also wrote that Claimant "refused breaks and was willing to continue with testing even though he was notably fatigued."

Dr. West administered the Welchsler Adult Intelligence Test (WAIS-III). Dr. West recorded a verbal score of 72 [with index scores in verbal comprehension (72) and working memory (80)] and a performance score of 68 [with index scores in perceptual reasoning (69) and processing speed (71)]. The full scale I.Q. was 67, with a measurement error of 5 points. On the WRAT-III subtests, Claimant scored 81 in math, 88 in spelling, and 102 in reading isolated words.

Dr. West's analysis of adaptive functioning was based on Pastor Donovan's completion of the Relative's Assessment of Patient Functioning Inventory. This was an assessment of Claimant's current condition.

40. *Dr. Perlman's Testing*: When Dr. Perlman tested Claimant in 2006, he administered tests different than Dr. West's. He administered the tests at Claimant's residence and attempted to put Claimant at ease. He described Claimant as motivated.

Dr. Perlman administered two intelligence tests. He administered the Kaufman Adolescent & Adult Intelligence Test (KAIT), which tests Crystallized Intelligence and Fluid Intelligence. Crystallized intelligence concerns knowledge that is gathered from formal education or environmental interaction, and Claimant had a scaled score of 83 [with a low score of 4 in auditory comprehension]. Fluid Intelligence concerns problem solving, and Claimant had a scaled score of 75 [with a high score of 8 on logical steps]. The composite I.Q. was 78, with a standard measurement error of 5 points. Dr. Perlman also administered the Kaufman Brief Intelligence Test, second Edition (KBIT-2), which is a brief measure of verbal and nonverbal intelligence. Claimant had a composite I.Q. score of 68.

Dr. Perlman tested processing tasks and achievement tasks. On the eleven tests designed to measure processing tasks, Claimant tested near the level of mental retardation on five tests but tested above that range on the remaining tests with three tests reaching the score of 90. Regarding academic achievement, Claimant performed outside the range of mental retardation on all eight achievement tasks, with very high scores in reading achievement: comprehension (87), vocabulary (88), and functional (91).

The reading subtest scores were high with the lowest score on the Nelson-Denny (77), but with the other scores ranging from 86 to 91. The math subtest scores were 83 and 84, and academic knowledge was also 84.

Regarding adaptive functioning, Pastor Donovan completed the Adaptive Behavior Assessment System, Second Edition (ABAS-II). The ABAS-II takes into account the demands normally placed on individuals the same age as the one being rated (here Claimant was age 45). Claimant's composite score was 64.[4]

[4] SDRC experts did no independent testing. They relied on the testing done by Dr. West and Dr. Perlman.

V. Expert Testimony

41. SDRC called three experts – Dr. Peterson, SDRC's Executive Director; Ron Plotkin, Ph.D., Coordinator of Education Services; and Harry Eisner, Ph.D., Coordinator of Psychology Services. Claimant called two experts – Dr. West and Dr. Perlman.

42. *Dr. Petersen*: Dr. Peterson is the Executive Director of SDRC and has been in that position for over 35 years. He personally participated in developing ARCA's standards for the fifth category. He was present at Claimant's informal meeting.

Dr. Peterson emphasized that, when Claimant was in his early thirties, Dr. MacLachlan initially assessed his intellectual ability as low average to average and then rendered a final diagnosis of low average to borderline intellectual functioning. Claimant's high school records were not consistent with mental retardation, nor were his work history or life skills. He worked on a farm and at gas stations; he handled money and credit cards; he drove a car and smuggled drugs and people over the boarder; he operated a tractor; he lived relatively independently. Claimant did not seem mentally retarded at the informal meeting. Finally, Claimant's recent low I.Q. scores might be explained by depression, substance abuse, automobile injuries, or the onset of dementia due to syphilis or aging. In short, there was no evidence that Claimant had a developmental disability in his early thirties or prior to age 18. Dr. Peterson's conclusions were based on the information available to SDRC prior to the eligibility determination.

43. *Dr. Plotkin*: Dr. Plotkin is a clinical psychologist, the Coordinator of Education Services at SDRC, and an expert in assessing educational records and achievement tests.[5] He listened to all the testimony presented at the hearing.

Dr. Plotkin testified that Claimant's school records and recent testing did not show a developmental disability before age 18. Claimant graduated from high school with an average grade between C+ and D-. The records showed mixed scores and uneven skill levels. On the national test, Claimant's scores showed a notable degree of scatter. Claimant's scores in math, reading, and reading comprehension were deficient, but there was evidence of strength in other areas. There were no records regarding special education and no evidence of psychological testing, as the parents decided not to pursue them. Dr. Perlman's recent testing showed that Claimant had below average reading skills. Dr. West's report also failed to show a reading disability. Dr. Plotkin testified that Claimant could not guess his way to higher scores on the recent subtests, and therefore, the national proficiency test scores might not have accurately reflected Claimant's ability in reading and math. Moreover, Dr. Perlman's and Dr. West's academic achievement tests showed that Claimant was consistently outside the range of mental retardation. Because Claimant acquired these

[5] Dr. Plotkin was the most credible expert regarding the interpretation of high school test scores, the national proficiency examination, and the recent academic subtests.

skills in school prior to the age of 18, Dr. Plotkin concluded that Claimant was not in the range of a mentally retarded person at age 18.

44. Dr. Plotkin found other factors significant. Claimant drove, used public transportation, worked, shopped, and prepared food. His ability to cross the boarder was particularly impressive. He was capable of understanding nuances, as evidenced by joking with Dr. Perlman at the 2006 assessment. He was aware of his deficits. He was capable of being manipulative, as evidenced by his exchange of the bus ticket to go to Mexico. He followed the complex directions required by the testing. In addition, Claimant had a history of psychiatric illness, depression, and other behavioral problems that might contribute to low test scores and other functional limitations. The psychiatric component was serious enough to require hospitalization and medication.

45. Dr. Plotkin testified that, in making a retrospective diagnosis concerning a person's intelligence and adaptive functioning before 18, the most important data concerns the person's first 18 years. The years immediately after turning 18 held the next most-important data. The evidence presented at the hearing showed that Claimant had a reading assessment as a child that showed no disability. His sister baby sat him and saw nothing noteworthy until the age of 10. Claimant had many years of tutoring that did not address math or science, yet he scored well in science on the national examination, and he performed fairly well on the recent math subtests. These showed Claimant's capacity to learn without special accommodation.[6] Claimant drove in high school, getting his license at age 16, and friends drove with him. He navigated to and from a prom 60 miles away having been shown the way only once. After graduating from high school, Claimant worked in a gas station and was recruited by another employer because he attracted customers. At age 25, Claimant had a psychiatric hospitalization. He was in a treatment setting for three months, but the discharge did not mention mental retardation. A mental status examination should have been given, and if mental retardation was suspected, the psychiatric facility should have released Claimant from the program. Moreover, Dr. Plotkin testified that the inadequate-personality diagnoses should not have been made without eliminating the possibility of mental retardation.[7] In the years following his initial psychiatric hospitalization, Claimant had numerous contacts with doctors, psychologists, and the court system, and there was no evidence that any of the professionals perceived Claimant as mentally retarded. Thus, Dr.

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[6] There was evidence that Claimant stayed after class with other teachers, but it was hearsay and extremely vague. There was no evidence that Claimant received tutoring or specific enrichment in math or science.

[7] Dr. Plotkin initially testified that a diagnosis of inadequate personality precluded a diagnosis of mental retardation. He based this conclusion on an online source describing the DSM's definition of the diagnosis. An actual copy of the DSM-II showed that the diagnosis did not explicitly require mental retardation to be ruled out, but it could be inferred from the language that the two diagnoses could not exist simultaneously. The inadequate-personality diagnosis was apparently dropped from the DSM-III in 1980, except for a reference in the index referring the reader to other personality disorders. It was not mentioned in the DSM-III-R in 1987. This somewhat undercut Dr. Plotkin's testimony. Dr. Plotkin should have checked the hard copies of the DSM, but that does not alter the fact that the words "inadequate personality" had a meaning in late 1986 and early 1987, and that meaning was inconsistent with a finding of mental retardation. In any event, the main point of the Beverly Manor discharge summary was the *absence* of a finding of mental retardation after a three-month hospitalization.

Plotkin concluded that the new evidence bolstered his original conclusion that Claimant was not developmentally disabled prior to age 18.

46. Dr. Plotkin placed Claimant's current I.Q. at 75 to 78. He relied on Dr. Perlman's testing because of his experience, and he relied on the KAIT results. He concluded that it was possible that Claimant's I.Q. was higher before the age of 18 because of the intervening psychiatric hospitalizations, substance abuse, syphilis, and automobile accidents. Regarding adaptive functioning, Dr. Plotkin testified that psychological testing was not the best way to test someone's functional skills. Observations of functioning were best, not by one source but by many, and as close in time to the events as possible. In any event, Claimant's reading and math subtests (K-Fast) were in the average range. Dr. Plotkin concluded that Claimant's functional limitations were not solely from low intelligence but were also influenced by emotional problems such as a desperate need for approval, depression, and psychiatric hospitalizations.

47. *Dr. Eisner*: Dr. Eisner is the SDRC's Coordinator of Psychology Services. He is in charge of testing and eligibility determinations. He was on Claimant's screening team. He met Claimant. He has conducted over 30,000 eligibility determinations, many of them concerning the fifth category.

Dr. Eisner was the most credible expert at the hearing. He admitted this was a close case. He openly acknowledged the limitations and weaknesses of his opinion, was open to considering new information, and genuinely appeared to want to reach an accurate diagnosis rather than a particular result. Most importantly, his experience in assessing people for fifth category eligibility was unparalleled.

48. Dr. Eisner's opinion was that no one factor either ruled out or confirmed that Claimant had a developmental disability, but the overall picture was not that of a person who qualified as mentally retarded or under the fifth category. Claimant was capable of describing his life in an organized way. He had some independent living skills, including work on a dairy farm and at gas stations. He worked at night. He lived alone. He drove himself and others in high school, which would be highly unusual for mentally retarded individuals. He had an interesting life after high school, and he displayed many accomplishments. Dr. Eisner acknowledged that Pastor Donovan described current difficulties in independent living. Claimant had experience handing money and credit cards. He procured illicit drugs, frequented prostitutes, and transported contraband across the boarder. His criminal behavior was not the type seen in regional center consumers. His high school performance was better than that of a typical mentally retarded child, and the high scores on the proficiency exam cut against a finding of mental retardation. Mentally retarded people do not usually surprise with intermittent high test scores. Claimant's recent academic testing was also inconsistent with a diagnosis of mental retardation or the fifth category. Although the recent intellectual testing showed some deficits in functioning, Dr. Eisner explained that these tests did not necessarily correspond to how Claimant functioned at age 18. Dr. Eisner testified that "if he had to guess" he would place Claimant in the "high borderline to low average range" of intellectual functioning. Claimant did not have the "flat

profile pattern" of a mentally retarded person. Further, many of Claimant's deficits appeared to fall in the realm of social and emotional difficulties, which might have created learning disorders. The psychiatric hospitalizations suggested that the social and emotional problem persisted. Finally, Claimant's drug use raised questions about recent degeneration in intellectual functioning.

49. Regarding the question of substantial disability, Dr. Eisner concluded that Claimant had no deficits in mobility and his communication skills were strong. He showed substantial independence in self direction. He had the ability to make rational decisions. His learning was weak and his self-care unclear. Evidence was mixed on the issues of capacity for independent living and economic self sufficiency because there was evidence that the inadequacies resulted from poor choices, social and emotional deficits, and drug use. He might have functioned much better if not for these influences. Dr. Eisner admitted that Claimant might benefit from regional center services, but not those afforded in the context of mental retardation. In short, Claimant's case was not typical of a mentally retarded person or a person in the fifth category because he displayed too many strengths.

50. Dr. Eisner testified that it was impossible to make a precise determination about what Claimant's I.Q was at age 18 – the best any expert could do was "guess." He believed that the regional center's team was good at making that determination based on all the evidence and the interpretation that made the most sense. He stated that Claimant's low I.Q. scores simply did not fit the other data. Given all the facts, the score of 78 on the KAIT was a good reference point. The new testimony revealed even more strengths than Dr. Eisner originally thought. These pushed Dr. Eisner away from fifth-category eligibility, even though it was admittedly a close case.

51. *Dr. West*: Dr. West recently obtained her license as a clinical psychologist. At the time she performed the intelligence testing, she was engaged in a post-doctoral fellowship. She had some experience with psychological testing but far less than Dr. Perlman. She had some experience diagnosing patients with mental retardation but far less than Dr. Eisner. Many of her opinions were based on the "literature" because she lacked substantial experience in the field.[8]

Dr. West diagnosed Claimant with mild mental retardation (Axis II). She also concluded that Claimant's "history and the present neuropsychological evaluation confirm[ed] a diagnosis of a developmental disability with onset prior to the age of 18." She based this conclusion on the results of the WAIS-III and the consistent result on the KBIT-2. She concluded that depression or dependant personality were not the cause of Claimant's low scores, and that the academic testing was consistent with mild mental retardation.

52. Dr. West testified that Claimant's academic scores in high school were higher than one would expect from a mentally retarded person but that that was not determinative.

[8] Barbara Schrock, Ph.D., a clinical neuropsychologist, reviewed, edited, and cosigned the report. Dr. Schrock did not testify.

Claimant's ability to live on his own, drive a car, and work were consistent with Dr. West's diagnosis because Claimant needed much assistance to live. He drove only on simple roads, and he performed jobs with a slow pace and limited duties. Claimant's drug use, use of prostitutes, and criminal activity were not inconsistent with mental retardation. In addition, Claimant had difficulties in all areas of adaptive functioning.

53. Dr. West testified that Claimant could have dementia secondary to syphilis. She acknowledged that drug use could affect intelligence testing, but she saw no evidence of this in the neuropsychological testing.

54. *Dr. Perlman*: Dr. Perlman is a clinical forensic psychologist with expertise in testing and assessments. His testimony and Curriculum Vitae demonstrated that the vast majority of his professional experience, specialized training, and publications were in psychological testing.

Dr. Perlman was unable "to make a definitive determination that [Claimant] does or does not have Mild Mental Retardation." However, Dr. Perlman concluded that Claimant functions similar to a person with mental retardation, that Claimant has severely impaired adaptive functioning, and that the impairments manifested before the age of 18.

55. Regarding the intelligence scores, Dr. Perlman initially estimated that Claimant's full scale I.Q was between 70 and 76 but later said it was in the 70 to 74 range. On the second day of testimony, Dr. Perlman created an unconventional chart using all three tests and opined that Claimant's I.Q. was between 68 and 73. Dr. Perlman discussed the intricacies of the subtest scores and explained how they bolstered his ultimate conclusion. Although Claimant showed intellectual strengths on some of these tests (such as logical steps), he showed weaknesses on others (such as auditory comprehension). Dr. Perlman concluded that Claimant's intelligence was on the edge of mental retardation. In other words, Claimant was in the upper end of mild mental retardation or the low end of the borderline range. Dr. Perlman testified that the testing could not support an I.Q. higher than that. He believed that this range met ARCA's definition of general intellectual functioning for the fifth category.

56. Dr. Perlman admitted that there was no accepted way to combine Claimant's discrepant I.Q. scores. Dr. Perlman was concerned about the 11 point discrepancy between the WAIS-III (67) and the KAIT (78), so he telephoned Dr. Kaufman, who said that an 11 point difference was acceptable given the time between tests. Dr. Kaufman stated that the adaptive behavior scales should be the deciding factor.

57. Regarding adaptive functioning, Dr. Perlman stated that there are two different assessment approaches. First were tests for global functioning, such as the Vineland and ABAS tests. Dr. Perlman used the ABAS-II, and Claimant got a scaled score of 72 in conceptual, 73 in practical, and 75 in social with a composite score of 64 because he was low in all three areas of functioning. According to Dr. Perlman, this testing met both portions of the AAMR's definition for deficits in adaptive functioning.

58. The second approach involves observation and review of a person's life, including records, to see where the person had been effective. Dr. Perlman made this assessment by looking at two levels: the "personal" and "instrumental."[9] Regarding Claimant's high school academics, Dr. Perlman thought the grades where not that good, but he could not determine what that meant given that Claimant's mother and tutor may have helped him with homework and given that the principal admitted passing Claimant despite a lack of academic achievement. Dr. Perlman noted that, in the national proficiency tests, Claimant failed to meet minimum competency requirements in reading and math. Dr. Perlman also put little stock in Claimant's higher scores in science and social studies because academic achievement can be taught, and he discounted Claimant's recent subtest scores on academic achievement because of Claimant's tutoring. Dr. Perlman noted that Claimant could clean his apartment, but others had to pay his rent. Claimant could attend to personal hygiene, but he could not purchase antifungal cream. Thus, there were differences between personal and instrumental functioning. Claimant was socially naive and easily manipulated, which could account for his use of drugs, his use of prostitutes, and his smuggling, but Dr. Perlman had not asked Claimant about these things.

59. On the question of "treatment" under the ARCA guidelines, Dr. Perlman testified that Claimant's performance based deficits were not due to lack of motivation. Claimant's skill deficits were not due to socio-cultural depravation. There was no real testimony on long term training; the focus was more on supports needed now and in high school. Claimant needed habilitation, rather than rehabilitation, to bring his skills up to speed. Dr. Perlman rejected the notion that Claimant needed treatment for dementia secondary to syphilis or drug addiction because the condition was rare and there was no evidence of it in the testing. Dr. Perlman testified that addiction to crack cocaine had its greatest affected on testing if the person was under the influence (i.e. it created physical rather than neurological deficiency). Since there was no evidence that Claimant used drugs before testing, there was no reason to doubt the accuracy of the tests.

60. On the issue of substantial handicap, Dr. Perlman testified that Claimant had no handicap in mobility, and he demonstrated mixed skill levels in communication and self care. He had a substantial handicap in learning (as demonstrated by the Rebus Learning test on the KAIT), self direction (as demonstrated by the ABAS-II), capacity for independent living, and economic self sufficiency.

61. Dr. Perlman testified that he had enough information to render an accurate, retrospective diagnosis concerning Claimant's eligibility under the fifth category because I.Q. remains stable over life, so the recent testing was sufficient. Dr. Perlman was not surprised by the lack of an earlier diagnosis because young children are often not diagnosed with mild mental retardation. The condition is observable when children reach a

[9] For example, on the personal level the question is whether a person can dress himself or herself, and on the instrumental level the question is whether a person can purchase clothes to dress himself or herself.

developmental milestone at around age 8, and the mentally retarded child fails to keep up. Even then, many families are in denial or do nothing unless the child "looks funny."

62. Dr. Perlman admitted certain limitations. He would have liked to have more records. He purposely avoided the area of employment because of the lack of facts in that area. He admitted that testimony from Claimant's five brothers, regarding Claimant's ability to work on the dairy farm might have been important. He acknowledged that, during Claimant's three-month psychiatric hospitalization, some mental health professional should have recognized low intellectual functioning. He would have expected to see some evidence in the shift notes and progress notes, but he was not surprised at the lack of a mental-retardation diagnosis. He was not troubled by the fact that Claimant lived in Mexico alone because he may have been homeless, but he recognized this as another gap in evidence. He admitted that Claimant's low scores on the high school proficiency tests could be false lows and that it was very difficult to get false highs. Claimant's recent academic achievement subtests were much higher than expected for someone with mild mental retardation, and he attributed this to an enriched school environment. He acknowledged that depression could affect intelligence testing, that he had not done emotional testing, and that he did not have enough information to rule out dependant personality disorder.

VI. Evaluation

63. *General Intellectual Functioning*: The DSM-IV-TR provides that:

> "General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children-Revised, Stanford-Binet, Kaufmann Assessment battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior . . . . When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading. (DSM-IV-TR at 41-42.)"

The DSM-IV-TR also provides for distinguishing among levels of intellectual impairment depending on the degree of severity of a party's mental retardation. The levels are as follows:

"Mild … IQ … 50-55 to approximately 70
Moderate … IQ … 35-14 to 50-55
Severe … IQ … 20-25 to 35-40
Profound … IQ … below 20 or 25. (DSM-IV-TR at 42.)"

According to the DSM-IV-TR, people with mild mental retardation:

> "typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth grade level. (DSM-IV-TR at 43.)"

A person with an IQ between 71 and 84, if not mentally retarded, is considered to be of borderline intellectual functioning. The DSM-IV-TR provides:

> "Borderline Intellectual functioning . . . describes an IQ range that is higher than that for Mental Retardation (generally 71 – 84). As discussed earlier, an IQ score may involve a measurement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information. (DSM-IV-TR at 48.)"

Under the ARCA guidelines for the determination of fifth category eligibility, a person functions similar to a person with mental retardation if the general intellectual functioning is in the low borderline range of intelligence, i.e. I.Q. scores ranging from 70 to 74. This could include I.Q. scores as high as 79 when considering the standard error of measurement. Otherwise, the ARCA standards would not be different than the DSM-IV-TR's definition for mild mental retardation.

64. *Claimant's Intellectual Functioning Before Age 18*: Claimant's recent tests demonstrated that he has borderline intellectual functioning. Dr. West's testing resulted in a score of 67 on the WAIS-III, and Dr. Perlman's testing resulted in a score of 68 on the KBIT-2 and a score of 78 on the KAIT. The KAIT score was the most-reliable indicator of Claimant's intellectual functioning. Dr. Perlman conducted the test, and he was far more experienced than Dr. West. More importantly, Dr. Perlman tested Claimant at home and made him comfortable, while Dr. West tested Claimant at a Sharp facility, and her report described Claimant as "distracted with internal stimuli" and "notably fatigued." It is also troubling that, shortly before Dr. West's testing, Claimant was admitted to Calvery

Rehabilitation Center for a ten-year amphetamine dependency.[10] The partially unresolved question of dementia secondary to syphilis created some additional doubt.[11] Further, the KAIT test was more comprehensive that the KBIT-2. It was given to Claimant first, presumably when he was most fresh in two days of testing. But at the same time, the lower KBIT-2 score could not be ignored, and in combination with the standard error of measurement on the KAIT, made it more likely than not that Claimant's *present* level of intellectual functioning is in the borderline range, somewhere between 73 and 78.[12]

65. This case concerns Claimant's level of intellectual functioning at age 18, and it demands a 27-year retrospective diagnosis. The DSM-IV-TR gives no guidance regarding how to make this sort of diagnosis. Although the experts at the hearing agreed that I.Q. stays relatively constant over time, Dr. Eisner explained that it was impossible to make a precise determination about what Claimant's I.Q was at age 18.[13] Here, the best reference point was the score of 78 on the KAIT. This level of intellectual functioning was supported by Claimant's stay at Scottsdale Camelback Hospital when he was 31 years old, where the final diagnosis on Axis II included low average to borderline intellectual functioning. Also important was the absence of a diagnosis of low intellectual functioning in the discharge diagnosis from Beverly Manor, as well as the concomitant diagnoses of a personality disorders that (at least arguably) precluded a finding of mental retardation.[14] The Camelback-Hospital diagnosis, in combination with the conspicuous absence of any mention of mental retardation over 31 years, made it more likely than not that Claimant's intellectual functioning, at age 18, was at least at the higher end of the borderline range.

66. Accordingly, Claimant did not meet his burden of showing general intellectual functioning consistent with mild mental retardation before age 18. The evidence did not

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[10] Dr. Perlman testified that drugs such as cocaine remain in a persons system for a considerable period of time. He opined that it would take several months to eliminate them from a person's system. Thus, there was a question about whether drugs affected the reliability of this test.

[11] According to Dr. Perlamn, dementia secondary to syphilis is rare, and there was no evidence of it in his testing. That may be true, but it is also true that a neuropsychologist stated that additional tests were necessary to rule out the possibility.

[12] Dr. Perlman began with a range of 70 to 76 on day one of his testimony, and on the second day lowered his estimate to a range between 68 and 73. Dr. Plotkin gave a range of 75 to 78. The KAIT was the best indicator of Claimant's present I.Q., but that the lower test results on the KBIT-2, in combination with the standard error of measurement on the KAIT, made a range between 73 and 78 most likely. This range straddled the ARCA guidelines for the fifth category.

[13] Dr. Perlman explained that the Flynn effect – which results from the re-norming of intelligence tests – could decrease a person's I.Q. score. Dr. Perlman testified that, in general, the Flynn effect resulted in a 3 point drop in I.Q. scores per a norming period. This was more evidence that a certain amount of uncertainty inheres in a 27-year retrospective diagnosis regarding general intellectual functioning.

[14] Dr. Perlman put little weight on this diagnosis, and would have preferred to see the nurses' notes and progress reports. This observation cut both ways, as it was Claimant's burden to demonstrate eligibility. Put another way, the discharge summary was some evidence concerning what qualified professions observed during the psychiatric hospitalization, and that evidence was not helpful to Claimant's case.

show that Claimant had an I.Q of 70 or below before age 18. Even Claimant's most qualified expert – Dr. Perlman – was reluctant to make a definitive diagnosis of mild mental retardation. Claimant is not eligible for regional center services on the theory that he was mildly mentally retarded before age 18.

67. This leaves the question of eligibility under the fifth category. The I.Q. testing showed that the most likely range of intelligence at present (I.Q. of 73 to 78) straddled ARCA's guidelines for fifth category eligibility (I.Q. of 70 to 74). The remaining evidence, however, strongly suggested that, at age 18, Claimant's intellectual functioning was at the higher end of the borderline range. This cut strongly against fifth category eligibility, as it tended to show that Claimant was "more similar" to a person with low average intelligence. Although it did not preclude eligibility altogether, it required a much stronger showing of adaptive deficits. As discussed below, that showing was not made.

68. *Adaptive Functioning*: The DSM-IV-TR criterion regarding adaptive functioning concerns limitations "in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, work, leisure, health, and safety."

Impairments in adaptive functioning rather than low IQ are usually the presenting symptoms in individuals with mental retardation. Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with mental retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

The DSM-IV-TR recommends that one gather evidence regarding deficits in adaptive functioning from one or more reliable independent sources, e.g. teacher evaluation and educational, developmental, and medical history. Several scales have also been designed to measure adaptive functioning or behavior (e.g. the Vineland Adaptive Behavior Scales and the American Association on Mental Retardation Adaptive Behavior Scale). These scales generally provide a clinical cutoff score that is a composite of performance in a number of adaptive skill domains.

The ARCA guidelines for fifth category eligibility indicate that, the more a person's I.Q rises above 70, the more necessary it becomes to demonstrate that there are substantial deficits that are clearly related to cognitive limitations. In assessing the level of deficits in adaptive skills, the eligibility team should consider whether there are clinical judgments supplemented by formal adaptive behavior scales, *skill deficits related to intellectual limitations* that result in the inability to perform essential tasks within adaptive domains or the inability to perform those tasks with adequate judgment, but not *skill deficits resulting from performance deficits, including physical limitations, psychiatric conditions, socio-*

cultural deprivation, poor motivation, substance abuse, or limited experience. The ARCA standards require the substantial deficits to originate before age 18.

69. *Claimant's Adaptive Functioning Before Age 18*: The Lanterman Act and the ARCA standards for fifth category eligibility require that the substantial deficits originate before age 18. Claimant did not produce sufficient evidence that he functioned similar to a person with mental retardation before age 18.

As Dr. Plotkin testified, in making a retrospective diagnosis concerning a person's adaptive functioning before 18, the most important data concerns the person's first 18 years. Here, there was not a single medical or psychological record from Claimant's first 18 years. There was no medical or developmental history. There were no adaptive behavior scales or assessments. There was not a single professional observation. The education record was nearly as sparse. There was only one school record, a transcript of high school grades with results from the national proficiency examination. There was only one note from an educator, the principal George Groen, indicating that Claimant was passed in several subjects in high school because of good attitude rather than subject mastery. But the note was not specific and gave little guidance as to what Claimant's true academic capabilities were in each subject area. There were no records from grade school and middle school, and there were no contemporaneous teacher notes or evaluations. This was a complete lack of "reliable independent sources" showing that Claimant's skill deficits were substantial.[15]

70. The few known records were not helpful to Claimant's case. An early test showed no reading disability, and the national-proficiency-test scores in science and social studies were not consistent with fifth category eligibility. After high school, Claimant spent three months at Beverly Manor in Riverside and was diagnosed with histrionic personality, inadequate personality, and dysthemic disorder, none of which pointed to skill deficits related to low intellectual functioning. Indeed, the diagnosis at Beverly Manor suggested that low intellectual functioning was not observed.

71. The recent adaptive-behavior scales did not fill the evidentiary gap. The DSM-IV-TR recommends that several qualified individuals be questioned regarding adaptive functioning, but here, the reporting relied too heavily on a single reporter, Pastor Donovan. The record contained evidence showing that Claimant may be more capable than Pastor Donovan perceives. For example, the staff at Oak Hill planned to send Claimant, *by himself*, on a weekend rip to Las Vegas; the investigator's report contained evidence that Claimant was capable of living on his own; and the long trips to Mexico demonstrated that Claimant

[15] Three witnesses testified about Claimant's behavior before age 18 – Johanne Verhoeven (sister), Mary Werkoven (tutor), and Pastor Dale Visser (friend). Claimant's principal also filed an affidavit. Obviously, these witnesses were not medical or psychological professionals. Moreover, Pastor Visser and the sister were relatively young when they were observing Claimant's early behavior, and the tutor and principal were not classroom teachers. These witnesses were not the best sources to relay key aspects of adaptive behavior at home, at school, or in the community, and they certainly were not qualified to render an expert opinion. Moreover, they were testifying about events that took place 27 to 31 years ago.

was capable of crossing the boarder and surviving in a foreign country. Moreover, a good deal of evidence indicated that factors other than low intelligence contributed to Claimant's current performance deficits. At age 25, Claimant had two psychiatric hospitalizations. He was prescribed medications, including Haldol and Prozac. He then smoked crack cocaine for ten years and was hospitalized for amphetamine dependence. He was morbidly obese, which contributed to bouts of depression. At least twice, he was diagnosed with dependent-type personality disorders. All of this showed that some of Claimant's *current* performance deficits were not due to low intellectual functioning. Put differently, the recent adaptive scales were not reliable evidence of how Claimant functioned 27 to 31 years ago.

72. The witnesses who knew Claimant in his first 18 years, described some skill deficits, but they also described many strengths. There appeared to be no significant malfunction in grade school. When Claimant was in the fourth grade, his sister noticed that he was a slow learner. But a reading test showed no disability. In junior high school, Claimant attended school, went to class, played with schoolmates, ate, and made change at the school cafeteria. He played flag football, used the lockers, and showered with his classmates, which meant that he dressed himself.

73. The remaining evidence focused on Claimant's high school years. Claimant had no physical disability. He communicated well. He went to class, sang in the choir, and worked with a tutor. There was no evidence of significant self-care issues, except the inability to shave with a conventional razor, which was decidedly outweighed by Claimant's ability to care for himself in a football locker room. Putting on and taking off football gear is no small task. He worked locker combinations. He had normal friends. He drove to school, his tutor's house, and some football events. He once drove to and from a prom 60 miles away after being shown the way only once. Friends sometimes drove with him. He lived at home, as do most high school students, and there was no evidence that he required special care. Indeed, he helped on the dairy farm by operating a tractor and feeding the livestock. To be sure, Claimant had weaknesses. He struggled in school and got poor academic grades. Others teased him and he lacked a sophisticated understanding of their motives. But given his age, his sociocultural background, and his community setting, Claimant had too many strengths to be qualified for fifth-category eligibility.

74. *Similar Treatment*: The Lanterman Act entitles a person to regional center services if he or she requires "treatment similar to that required for individuals with mental retardation." In discussing adults with mild mental retardation, the DSM-IV-TR says:

> "During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings. (DSM-IV-TR at 43.)"

In discussing adults with moderate mental retardation, the DSM IV TR says:

> "They profit from vocational training and, with moderate supervision, can attend to their personal care. They can also benefit from training in social and occupational skills . . . . They may learn to travel independently in familiar places . . . . In their adult years, the majority are able to perform unskilled or . . ."

When eligibility is the issue, the Lanterman Act and the ARCA guidelines require that the developmental disability, and consequently the treatment for that disability, originate before the age of 18. The eligibility team must consider the nature of the training and intervention required for a person with global cognitive deficits. The team should consider whether the individual (1) demonstrates performance based deficits, (2) has skill deficits secondary to intellectual limitations (but not socio-cultural depravation), (3) requires habilitation (but not rehabilitation), or (4) requires long term training broken down into discrete units taught by repetition. For children, an evaluator should consider the intensity and types of educational supports needed to assist learning.

75. *Claimant's Evidence Regarding Treatment Before Age 18*: Claimant presented evidence regarding treatment, but almost all of it concerned his current status and condition. Dr. West described the services she believed Claimant could benefit from now, and Dr. Perlman went through ARCA's criteria from the point of view of Claimant's current needs. Thus, there was no credible or reliable evidence that, before age 18, Claimant required treatment similar to that required by a mentally retarded person.

76. *Substantial Disability*: The Lanterman Act requires a higher showing of functional impairment than the DSM-IV-TR. In order to qualify for regional center services, the developmental disability must constitute a "substantial disability." This means that the individual must have significant functional limitations in three or more of the following areas of major life activity, as appropriate to the age of the person: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd. (l).)

California Code of Regulations, title 17, section 54001, subdivision (a), defines a substantial disability as "[a] condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential." ARCA's guidelines for fifth-category eligibility repeat these requirements and add that, for children 6 to 18 years of age, the determination should be made using only six areas of functioning. Economic self-sufficiency is not considered.

77. *Claimant's Substantial Disability Before Age 18*: The analysis of adaptive functioning largely addressed this issue and is incorporated by reference (Factual Findings 69 through 73).

Regarding mobility, Claimant had no mobility difficulties before age 18. He played football and drove a car. He could hit a golf ball 300 yards. Regarding self-care, Claimant dressed himself for school, football practices, and games. Even in junior high school, he was able to care for himself in a locker room, could feed himself, and could order and pay for food at school. He was not much concerned with his appearance, and once cut himself shaving, but this hardly qualified as a "significant functional limitation" in self care. Claimant had fairly good communication skills. He went to school, attended class, sang in the choir, and spoke with his tutor and his friends. It is impossible, on this evidence, to conclude that he had significant functional limitations in receptive and expressive language. Claimant's early testing showed that he had no reading disability, and the high scores on the national proficiency test showed an ability to learn, as did the recent academic achievement scores. On the other hand, Claimant's principal stated that he did not do well in academic subjects, and his tutor testified that he struggled in school. Unfortunately, much of this testimony was vague. There was no indication as to which subjects Claimant passed on his own merit. There was no testimony as to which subjects were the ones in which he received special attention from school teachers or how much attention he received. There was no explanation for the relatively high scores on the national proficiency tests for social studies and science. On balance, Claimant did not demonstrate that he had global cognitive limitations on learning. Turning to capacity for independent living, Claimant got his driver's license at age 16 and drove significant distances, albeit often on country roads. Most importantly, he assisted on the dairy farm by operating a tractor and feeding the livestock. In junior high and high schools, he could handle money. And immediately after high school, he got a job in a gas station where he handled monetary transactions. This evinced a capacity for independent living fairly "appropriate to the age of the person." Claimant's self-direction was suspect, but there was a serious question as to whether this was due to a personality disorder rather than limited intellectual functioning. On this evidence, it cannot be found that Claimant had significant functional limitations in three of the applicable areas of major life activity before age 18.

78. *Summary*: While there was some evidence of disability prior to age 18, that evidence was not sufficient to sustain the burden of proof. There was a decided lack of reliable evidence from Claimant's first 30 years, and the weight of the evidence concerning Claimant's current status was severely undercut by evidence suggesting a decline in functioning that occurred well after the developmental period. To be sure, new evidence from Claimant's childhood and adolescence might change this analysis. On this record, however, Claimant has not met his burden of demonstrating that he had a developmental disability before age 18.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Act) is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et seq.) The purpose of the Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with *developmental disabilities*, regardless of age or degree of

handicap, and at each stage of life." (§ 4501; Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 388 (emphasis added).)

2. Section 4512, subdivision (a) of the Act defines a developmental disability as follows:

> "(a) 'Developmental disability' means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a *substantial disability* for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (Emphasis added.)

3. Section 54000 of Title 17 of the California Code of Regulations further defines the term developmental disability:

> "(a) 'Developmental Disability' means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.
>
> (b) The Developmental Disability shall: (1) Originate before age eighteen; (2) Be likely to continue indefinitely; (3) Constitute a substantial disability for the individual as defined in the article.
>
> (c) Developmental Disability shall not include handicapping conditions that are: (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder. (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss. (3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation."

4. Section 4512, subdivision (l) of the Act defines a substantial disability as follows:

"(l) 'Substantial disability' means the existence of *significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person*: (1) Self-care. (2) Receptive and expressive language. (3) Learning. (4) Mobility. (5) Self-direction. (6) Capacity for independent living. (7) Economic self-sufficiency. Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible."

5. Section 54001 of Title 17 of the California Code of Regulations further defines the term substantial disability:

"(a) 'Substantial disability' means: (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age: (A) Receptive and expressive language; (B) Learning; (C) Self-care; (D) Mobility; (E) Self-direction; (F) Capacity for independent living; (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible."

6. Section 54002 of Title 17 of the California Code of Regulations states that "'Cognitive' as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience."

7. The Lanterman Act, the California Code of Regulations, the AAMR, and the DSM-IV-TR do not contain standards for assessing eligibility under the fifth category. The Lanterman Act merely states a person is eligible for regional center services if he has a condition "closely related to mental retardation" or requires "treatment similar to that

requires for individuals with mental retardation." In *Mason v. Office of Administrative Hearings, supra*, 89 CalApp.4th at 1129, the California Court of Appeal held that the fifth category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." The court held that the Legislature delegated responsibility for setting standards to the Department of Developmental Services and Regional Center professionals. **(***Ibid***.)** In 2002, ARCA refined the standards for purposes of making eligibility determinations in California. Those standards were used in making the fifth-category determination in this case.[16]

8. In a proceeding to determine eligibility, the burden of proof is on the Claimant to establish that he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

9. Claimant's evidence was insufficient to show that his intellectual functioning met the criteria for mild mental retardation before age 18. This conclusion was based on Factual Findings 2, 3 6, 7 through 66, and 80 and Legal Conclusions 1 through 3 and 8.

10. Claimant's evidence was insufficient to show that his adaptive functioning met the criteria for mild mental retardation before age 18. This conclusion was based on Factual Findings 2, 3, 6, 7 through 66, and 80 and Legal Conclusions 1 through 3 and 8.

11. Claimant's evidence was insufficient to show that he had a substantial disability as the result of mild mental retardation before age 18. This conclusion was based on Factual Findings 2, 5 through 62, and 78 through 80 and Legal Conclusions 1 through 6 and 8.

12. Claimant's evidence was insufficient to show that his intellectual functioning or his adaptive functioning constituted a disabling condition closely related to mental retardation before age 18. This conclusion was based on Factual Findings 2, 4, 6 through 73, and 80 and Legal Conclusions 1 through 3, 7, and 8.

13. Claimant's evidence was insufficient to show that he had a disabling condition requiring treatment similar to that required for individuals with mental retardation before age 18. This conclusion was based on Factual Findings 2, 4, 6 through 62, 74, 75, and 80 and Legal Conclusions 1 through 3, 7, and 8.

14. Claimant's evidence was insufficient to show that he had a substantial disability before age 18. This conclusion was based on Factual Findings 2, 5 through 62, and 78 through 80 and Legal Conclusions 1 through 8.

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[16] The standards appear in Exhibit A-49. The parties stipulated that these standards should govern the fifth-category analysis in this case.

ORDER

The SDRC's denial of regional center services is upheld. Claimant failed to demonstrate that he had a developmental disability before age 18.

DATED: _____

_____
GARY BROZIO
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.